Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT WARD,

Petitioner

-v-

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF OAKLAND COUNTY, MICHIGAN

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QUESTIONS PRESENTED

Petitioner Vincent Ward was convicted of first degree murder at a jury trial, at which we submit serious constitutional error occurred. He was sentenced to life in prison. Habeas Corpus was denied.

The questions presented are:

QUESTION 1: WHETHER PETITIONER WAS DENIED THE RIGHT OF CONFRONTATION AND PREJUDICED BY TESTIMONY THAT PETITIONER ATTACKED THE VICTIM FIRST, INSTEAD OF SUPPORTING PETITIONER'S VERSION THAT THE VICTIM ATTACKED HIM, WHERE THE TESTIFYING WITNESSES DID NOT SEE THE EVENT.

QUESTION 2: WHETHER PETITIONER WAS DENIED THE RIGHT OF CONFRONTATION AND PREJUDICED WHERE THE PROSECUTOR STATED TO THE JURY THAT PETITIONER HAD MADE A STATEMENT TO MS. PRYOR THAT CONTRADICTED HIS STATEMENT TO POLICE, WHERE MS. PRYOR DID NOT TESTIFY.

QUESTION 3: WHETHER PETITIONER WAS DENIED DUE PROCESS AND OTHER RIGHTS BY TESTIMONY THAT WHEN FIRST QUESTIONED BY POLICE, HE EXERCISED HIS RIGHT TO REMAIN SILENT.

QUESTION 4: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

QUESTION 5: WHETHER THE TRIAL COURT USED A STANDARD OF REVIEW THAT UNREASONABLY

AND UNCONSTITUTIONALLY ELIMINATED ALL REVIEW OF LEGAL ERRORS.

QUESTION 6: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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-v-

STATE OF MICHIGAN,

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PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF OAKLAND COUNTY,
MICHIGAN

VINCENT WARD, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Oakland County, Michigan Circuit Court, of March 15, 2005, denying a Motion for Relief from Judgment, with leave to appeal later denied by the Michigan Court of Appeals on September 28, 2006 and by the Michigan Supreme Court on April 24, 2007.

OPINIONS BELOW

The Appendix includes the order of the Michigan Supreme Court of April 24, 2007, order of the Michigan Court of Appeals of September 28, 2006, opinion and order of the Oakland County Circuit Court of March 15, 2005, order of the Michigan Supreme Court of January 26, 1999, opinion of the Michigan Court of Appeals of May 1, 1998.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Oakland County, Michigan, Circuit Court. The original judgment was entered July 10, 1996. The Michigan Court of Appeals affirmed May 1, 1998. The Michigan Supreme Court denied leave to appeal January 26, 1999. The opinion and order of the Oakland Circuit Court denying Motion for Relief from Judgment was March 15, 2005. The order of the Michigan Court of Appeals denying leave to appeal was October 24, 2006. The order of the Michigan Supreme Court denying leave to appeal was April 24, 2007. This Court has jurisdiction under 28 U.S.C. §1257 to review the final judgment or decree of a state court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the

> accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Vincent Ward was convicted of first degree murder and felony firearm in the death of Young Choi, in a jury trial in the Oakland County Circuit Court before the Hon. Robert Anderson, Case No. CR95-141741-FC. On July 10, 1996, Judge Anderson sentenced Petitioner to prison for

life plus 2 years. Trial attorney was Cyril Hall. Appeal attorney was Lawrence Imerman. On May 1, 1998, the Court of Appeals affirmed, Case No. 200739. On January 26, 1999, the Michigan Supreme Court denied leave to appeal. Case No. 112346. Motion for Relief from Judgment was filed in the Oakland County Trial Court and denied March 15, 2005 in an Opinion and Order by the Honorable Gene Schnelz. On September 28, 2006 the Michigan Court of Appeals denied leave to appeal. On April 24, 2007, the Michigan Supreme Court denied leave to appeal. Petitioner now seeks review by certiorari in the United States Supreme Court.

Statement of Facts

Sara Choi testified that she and her husband Young Choi owned Englewood Beauty Supply. (T II, 41). On April 21, 1995, she heard a car crash outside, and told Mr. Choi to go outside to see what happened. She stayed in the store to wait on customers. (T II, 42-43).

Sara Choi testified that Sandra McFarland, who did not testify as a witness at trial, came in the store and said to call the police because "this guy tried to hit your husband." (T II, 43).

She later went outside and saw glass in the parking lot near her husband's car, which she thinks came from the other party's car. (T II, 44). This happened 5 or 10 minutes after her husband went outside. (T II, 66). Her husband tried to catch the driver, whom she identified as Petitioner Vincent Ward. (T II, 49). She thought there would be a fight if her husband caught him, but he did not catch him. (T II, 71).

She testified that Petitioner hit her husband's face, although she did not see such a thing. (T II, 72). She did not see what actions her husband took immediately before the shooting. (T II, 76).

She testified that "My husband got punch (sic) in the face once and my hus--my husband punched him back. That's what I heard." (T II, 77).

Back in the store, she heard a gun sound, but never saw the gun. She saw Petitioner in the store. She saw her husband on the ground covered in blood. (T II, 55-59).

Otok Breaux testified that she worked in the store. (T II, 150). She and Young Choi went outside, saw Mr. Choi's van, which had damage in the rear. (T II, 152). She then went back in the store. (T II, 152). After 10 minutes "Then I heard somebody say, Mr. Choi got hit." (T II, 154). She never saw Mr. Choi and the man with the white car fight. (T II, 167). She did see Mr. Choi arming himself with a stick. (T II, 173).

Defense counsel asked if she remembered saying that she did see the fight, and the witness told the jury what she had been told (T II, 180):

Nathaniel Roberts, a shopper at the shopping center, testified that he saw the Chinese guy [1] and the "light-skinned guy" arguing, when the Chinese guy socked the light-skinned guy in the face. "And the light-skinned guy fell, and he got up, and the Chinese guy just started hitting him." (T II, 202).

Michael Dixon, a customer at the car wash, testified that he saw a white car swerve and hit a parked van. (T II,

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[1] Mr. Choi was apparently Korean.

215). He testified that he saw the beauty shop store owner come out. "They exchanged some words. I seen the store owner punch him in the face." (T II 217). There was a second confrontation where Petitioner walked up to the store owner and "uttered words" at the store owner, "and I noticed that the store owner kicked him in the chest." (T II, 227).

Dr. Kanu Virani testified that the victim died from two gunshot wounds. The shot to the head would have made him immediately unconscious, and he might have already been dead when the second shot hit. He had an abrasion on his face consistent with a fall. He had no injury to his jaw. (T III, 8, 14, 18-20).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER PETITIONER WAS DENIED THE RIGHT OF CONFRONTATION AND PREJUDICED BY TESTIMONY THAT PETITIONER ATTACKED THE VICTIM FIRST, INSTEAD OF SUPPORTING PETITIONER'S VERSION THAT THE VICTIM ATTACKED HIM, WHERE THE TESTIFYING WITNESSES DID NOT SEE THE EVENT.

The issue concerns hearsay statements violating confrontation rules that were the only evidence that Petitioner started the fight. The eyewitnesses said Petitioner was hit several times in the face, kicked in the chest, knocked to the ground, and chased, after hitting the victim's unoccupied van while driving in the parking lot. This supported a claim of voluntary manslaughter on which the judge instructed. The

error was prejudicial because if Petitioner had started the fight, he would not be reacting to provocation, and thus voluntary manslaughter would not apply.

Petitioner Vincent Ward was convicted of first degree premeditated murder and felony firearm in the death of Young Choi. Sara Choi testified that she and her husband Young Choi owned Englewood Beauty Supply. (T II, 41). On April 21, 1995, she heard a car crash outside, and told Mr. Choi to go outside to see what happened. She stayed in the store to wait on customers. (T II, 42-43).

Sara Choi testified that Sandra McFarland, who did not testify as a witness at trial, came in the store and said to call the police because "this guy tried to hit your husband." (T II, 43). She testified that Petitioner hit her husband's face, although she did not see such a thing. (T II, 72). She did not see what actions her husband took immediately before the shooting. (T II, 76). She testified that "My husband got punch (sic) in the face once and my hus--my husband punched him back. That's what I heard." (T II, 77).

The testimony of Sara Choi was that Petitioner was the aggressor, that Petitioner hit Young Choi first, and Young Choi only responded to being hit. Because she did not see any such thing, she should not have been permitted to testify as a witness that was the sequence of events.

Otok Breaux testified that she worked in the store. (T II, 150). She and Young Choi went outside, saw Mr. Choi's van, which had damage in the rear. (T II, 152). She then went back in the store. (T II, 152). After 10 minutes "Then I heard somebody say, Mr. Choi got hit." (T II, 154). She never saw Mr. Choi and the man with the white car fight. (T

II, 167). She did see Mr. Choi arming himself with a stick. (T II, 173).

Defense counsel asked if she remembered saying that she did see the fight, and the witness told the jury what she had been told (T II, 180):

> "Q You sure you don't remember that?
>
> A No. I think somebody tell me some guy hit Choi. I went out there. I asked Choi, are you okay. He say, yeah, he hit me so I hit him back."

We now had two witnesses, neither of whom saw the fight, testifying to the jury that the way the fight went was Petitioner hit Mr. Choi, and Mr. Choi only responded to being hit.

This hearsay testimony by the two women contradicted testimony by others. Nathaniel Roberts, a shopper at the shopping center, testified that he saw the Chinese guy [2] and the "light-skinned guy" arguing, when the Chinese guy socked the light-skinned guy in the face. "And the light-skinned guy fell, and he got up, and the Chinese guy just started hitting him." (T II, 202).

Michael Dixon, a customer at the car wash, testified that he saw a white car swerve and hit a parked van. (T II, 215). He testified that he saw the beauty shop store owner come out. "They exchanged some words. I seen the store owner punch him in the face." (T II 217). There was a

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[2] Mr. Choi was apparently Korean.

second confrontation where Petitioner walked up to the store owner and "uttered words" at the store owner, "and I noticed that the store owner kicked him in the chest." (T II, 227).

The jury now had two versions of the facts. In the version of the two male witnesses, they saw Young Choi repeatedly hitting Petitioner, and one of them saw Choi kicking Petitioner in the chest. Certainly, for one adult to be able to kick another adult in the chest shows a level of fighting ability well above average. The aggressive actions of Mr. Choi described by these witnesses shows a level of provocation that might cause a reasonable person to respond.

In the version of the two female witnesses, Petitioner hit Young Choi, and Mr. Choi only responded. The jury then had to decide which version of the facts they believed. The problem is that the version told by the female witnesses should never have been heard by the jury at all, because based on hearsay, MRE 801, MRE 802, and not on personal knowledge, MRE 602.

Even if the source of the "information" that Petitioner attacked Choi, instead of Choi attacking Petitioner, was Mr. Choi himself (the source does not appear on the record), this would not be a dying declaration because he said nothing after being shot, (T II, 163). *People v Siler*, 171 Mich App 246 (1988). The record shows a series of confrontations, culminating in the shooting.

In closing argument, defense counsel argued that the Petitioner did not premeditate and deliberate when he shot. (T III, 63). He indicated that "the question is whether or not he discharged that weapon in an excited state." (T III, 69). He asked "Was his mind clouded by the excitement of the

moment?" (T III, 69-70). "If the shooting takes place during the excitement of the moment, borne by the events, that is manslaughter." (T III, 71). He then discussed the effect on the Petitioner of being beaten up by Mr. Choi. (T III, 71).

He argued "When an individual is confronted with an individual that has assaulted him and commits an act, you look at the mental state and you listen to the instructions of the Court, as it relates to mental state." (T III, 75).

The judge instructed the jury on first degree premeditated murder, second degree murder, voluntary manslaughter, and self-defense. (T III, 97-103). He instructed that the person who begins the assault cannot claim self-defense. (T II, 102).

US Const, Amend VI provides:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"

The right of a defendant to cross-examine the witnesses against him is recognized under the US Constitution as being the most fundamental of rights. *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974); *Lee v Illinois*, 476 US 530; 106 S Ct 2056; 90 L Ed 2d 514 (1986); *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *People v Reed*, 393 Mich 342 (1975). Petitioner could not confront whoever it was who allegedly saw him attack Mr. Choi first, because that person was not identified. The only people who testified to seeing the fight said Choi attacked Petitioner. See also *Crawford v. Washington,* 541 U.S. 36; 124 S.Ct. 1354

(2004) [*Crawford* does not apply retroactively to the instant case; see *Whorton v. Bockting*, ___ U.S. ___; 127 S. Ct. 1173 (2007)].

The admission of the hearsay testimony not subject to cross-examination was prejudicial because if Petitioner had started the fight, he would not be reacting to provocation and could not lawfully claim self-defense, as the judge expressly instructed. (T II, 102). Thus, self-defense was not considered at all, because of this hearsay.

"Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation, and before a reasonable time has passed for the blood to cool and reason to resume its habitual control." *People v Fortson*, 202 Mich App 13 (1993). There must be evidence that there was something that could cause a reasonable person to lose control. *People v Pouncey*, 437 Mich 382 (1991). The attack by the outraged owner of the van Petitioner hit qualifies as provocation, if the jury accepted the live testimony, and rejected (or were never to hear) the hearsay testimony.

Because this is "plain error," the failure of defense counsel to object is excused. MRE 103; *Wischmeyer v Schanz*, 449 Mich 469, 483 (1995); *People v Grant*, 445 Mich 535, 547-548 (1994); *People v Carines*, 460 Mich 750 (1999). Under *People v Carines*, the test is:

> "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."

Therefore there is no strictly and regularly applied

procedural default to bar federal court review. *Johnson v. Mississippi*, 486 U.S. 578, 587; 108 S.Ct. 1981; 100 L.Ed.2d 575 (1988).

It is plain error, in that the rule requiring witnesses to testify on the basis of personal knowledge, and that requires the opportunity for cross-examination of the source of the information, is well known. The error affected substantial rights because it was clearly improper, and constituted the only proof that Petitioner started the fight, and if he started the fight he was not reacting to provocation, a legitimate defense raised in this case and instructed on by the judge. Under *Brecht v Abrahamson*, 507 US 609; 113 S Ct 1710; 123 L Ed 2d 353 (1993), the error "had a substantial and injurious effect or influence in determining the jury's verdict."

The trial court did not consider the applicability of the Sixth Amendment, U.S. Const., Amend VI. Instead, the judge determined that prejudice could never be established because of the nature of the evidence at trial and held:

> "Defendant argues that he shot the victim in self-defense. If the jury is presented with evidence that Defendant killed the victim, and it was not in self-defense, then regardless of any error, Defendant cannot demonstrate there is prejudice." (Op., 4).

This finding is unreasonable, illogical and contrary to established law. The inconsistent and unreasonable nature of the holding is the subject of a separate issue. (See Question 5). If the jury had not been presented with any evidence that

a defendant killed a victim there would have been no trial in the first place from which any review is being sought. In other words, if a defendant is convicted of murder and raised self-defense, then that defendant can never have court review of any error relating to the presentation of evidence against him. In addition to being unreasonable, this ruling violates equal protection rights.

This Court should grant certiorari, and upon full review of the issue grant a new trial, ruling that the repeated testimony of what happened, by people who did not see what happened, was a violation of the confrontation. In the alternative, since the error mainly affects the question of voluntary manslaughter, the Court could reduce the conviction to manslaughter and resentence, while reserving to the prosecutor the right to retry on first degree murder. See *People v Kamin*, 405 Mich 482 (1979).

QUESTION 2: WHETHER PETITIONER WAS DENIED THE RIGHT OF CONFRONTATION AND PREJUDICED WHERE THE PROSECUTOR STATED TO THE JURY THAT PETITIONER HAD MADE A STATEMENT TO MS. PRYOR THAT CONTRADICTED HIS STATEMENT TO POLICE, WHERE MS. PRYOR DID NOT TESTIFY.

Petitioner Vincent Ward was convicted of first degree murder and felony firearm. In rebuttal closing argument, the prosecutor said (T June 20 1996, 86):

> "Ladies and gentlemen, he told the police he shot him in self-defense. He told the police--here, he told Kenesha Pryor that he shot him because he

disrespected him;"

Kenesha Pryor did not testify, and Petitioner formally waived her presence as a witness on the record. (T June 20 1996, 46). Petitioner himself did not testify, and waived his right to do so. (T June 20 1996, 44-45).

The only mention of Kenesha Pryor during the evidentiary portion of the case was when Det. Serna testified that Kenesha Pryor was Petitioner's girlfriend, and that he had confirmed through the rental agency that she had rented the car driven by Petitioner, a white Ford. (T June 20 1996, 256).

Where a prosecutor's comments violate an explicitly granted right under the Constitution, the comments constitute a constitutional violation. *Donnelly v DeChristoforo*, 416 US 637; 94 S Ct 1868; 40 L Ed 2d 431 (1974). Where a prosecutor argues facts not in evidence, the prosecutor becomes a witness, not subject to cross-examination. In so doing, he violates due process and the constitutional right of confrontation. *Berger v United States*, 295 US 78; 55 S Ct 629; 79 L Ed 1314 (1935).

Petitioner submits that by presenting to the jury his version of what Kenesha Pryor would have said if she had testified, and presenting to the jury as fact that Petitioner made statements to Kenesha that contradicted his statement to police that he shot in self-defense, the prosecutor improperly acted as a witness, improperly presented false information to a jury, and presented testimony not subject to cross-examination. It was particularly prejudicial where the comment was made in rebuttal closing argument when

defense counsel had no opportunity to respond.

It is improper and a denial of due process for the prosecutor to argue facts not in evidence. *Berger v United States*, 295 US 78; 55 S Ct 629; 79 L Ed 1314 (1935); *United States v Leon*, 534 F2d 667, 679 (CA 6, 1976); *United States ex rel Shaw v DeRobertis*, 755 F2d 1279 (CA 7, 1985); *United States v Latimer*, 511 F2d 498 (CA 10, 1975), *United States v Whitmore*, 480 F2d 1154 (CA DC, 1973), *United States v Gonzalez-Vargas*, 558 F2d 633 (CA 1, 1977); *United States v Lamerson*, 457 F2d 371 (CA 5, 1972); US Const, Amend XIV.

Here, as in *United States ex rel Shaw v DeRobertis*, 755 F2d at 1281, "The prosecutor violated the fundamental rule, known to every attorney, that argument is limited to the facts in evidence."

For the prosecutor to provide the jury with evidence that the witnesses did not provide the jury is for the prosecutor to unlawfully assume the role of witness. *Berger v United States*, supra. Because the defendant cannot cross-examine a prosecutor who does not take the stand, such actions by the prosecutor violate the fundamental right of cross-examination.

The right of a defendant to cross-examine the witnesses against him is recognized under the US Constitution as being the most fundamental of rights. US Const, Amend XIV; *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974); *Lee v Illinois*, 476 US 530; 106 S Ct 2056; 90 L Ed 2d 514 (1986); *People v Reed*, 393 Mich 342 (1975). The prosecutor stated to the jury alleged facts that, if true, could only be testified to by Kenesha Pryor or Petitioner Vincent

Ward. Neither of those people testified. Even if the prosecutor did have a police report that Ms. Pryor told them of such a statement, the prosecutor cannot legitimately present that to the jury without a witness subject to cross-examination.

See also *Crawford v. Washington,* 541 U.S. 36; 124 S.Ct. 1354 (2004). *Crawford* does not apply retroactively to the instant case; see *Whorton v. Bockting,* ___ U.S. ___; 127 S. Ct. 1173 (2007). In an interesting parallel to this case, the prosecutor in *Crawford* argued to the jury that the out of court statement was "'damning evidence' that 'completely refutes [petitioner's] claim of self-defense.'" This was found to make the error prejudicial.

The prosecutor's action was clearly prejudicial. Petitioner gave a statement to police that he did shoot, but in self-defense. However, if Petitioner shot because he was disrespected, that obviously is not self-defense. The prosecutor's action directly negated the defense, with "evidence" not subject to the right of cross-examination.

A conviction should be reversed where prejudicial and improper argument by the prosecutor has the effect of denying the defendant a fair trial. *United States v McLain,* 823 F2d 1457 (CA 11, 1987); *Bruno v Rushen,* 721 F2d 1193 (CA 9, 1983). The standard is whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristoforo,* 416 US 637 (1974).

If the argument is sufficiently improper, it may be cause for reversal even without an objection. *United States v Harris,* 523 F2d 172 (CA 6, 1973); *Malley v Manson,* 547

F2d 25 (CA 2, 1976); *People v Rosales*, 160 Mich App 304 (1987).

Numerous cases have granted relief to defendants based on improper prosecutor argument, where the defendant failed to object. Therefore, Petitioner is not foreclosed from review even though his attorney failed to object. MRE 103(d); *People v Knolton*, supra; *People v Ellison*, supra; *People v Sterling*, 154 Mich App 223 (1986); *People v Rone (on 2nd remand)*, 109 Mich App 702, 715 (1981); *People v Rosales*, 160 Mich App 304 (1987); *People v Auer*, 393 Mich 667 (1975); *People v Humphreys*, 24 Mich App 411, 416 (1970); *People v Tarpley*, 41 Mich App 227 (1972); *People v Coffman*, 45 Mich App 180 (1973); *People v Strong*, 404 Mich 357, 363 (1978).

Because it is plain error for the prosecutor to make argument unsupported by the evidence, and to deceive the jury, the failure of defense counsel to object is excused. MRE 103; *Wischmeyer v Schanz*, 449 Mich 469, 483 (1995); *People v Grant*, 445 Mich 535, 547-548 (1994); *People v Carines*, 460 Mich 750 (1999). Under *People v Carines*, the test is:

> "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."

Moreover, under Michigan law, when an issue is jurisdictional, the Court is required to hear the issue without inquiry into "cause and prejudice." MCR 6.508(D); *People v Carpentier*, 446 Mich 19, 30 (1994). A jurisdictional issue deals with jurisdiction, that is, the authority of people to

perform certain acts. As the Court put it in *Markillie v Board of County Road Commissioners*, 210 Mich App 16 (1995), jurisdiction is the "power to act."

The prosecutor had no authority to act as a witness. Yet, he effectively acted as a witness by telling the jury facts that did not come from the legitimate witnesses. Because he went beyond his jurisdiction, this is a jurisdictional issue. Michigan has no strictly and regularly applied rule barring review of jurisdictional issues in a Motion for Relief from Judgment.

For all these reasons, under *Johnson v. Mississippi*, 486 U.S. 578, 587; 108 S.Ct. 1981; 100 L.Ed.2d 575 (1988) federal court review is not precluded.

Under the circumstances, "we cannot say with any certainty that an instruction by the Court to the jury would have countered the impact and eliminate the prejudice" of the remarks made by the prosecution. *People v Tarpley*, 41 Mich App 227, 237 (1972); see also *People v Humphreys*, 24 Mich App 411, 419 (1970). If the judge had stricken the offending portion of the argument, or told the jury to disregard it, or told the jury that the comments of the attorneys are not evidence, the jury would simply conclude that the defense had successfully talked the judge into excluding the relevant evidence that the prosecutor was discussing. Once spoken by the prosecutor to the jury, these allegations could not help but have a devastating effect on the course of the trial.

Under *Brecht v Abrahamson*, 507 US 609; 113 S Ct 1710; 123 L Ed 2d 353 (1993), the error "had a substantial and injurious effect or influence in determining the jury's verdict."

It cannot be said that the prosecutor's effort to make Petitioner look guilty by showing that he confessed this was not self-defense did not have its intended effect. The prosecutor would not have made the remark if he did not believe it would have an impact. The State should not be permitted to take a contrary position simply because the exigencies of trial have been replaced with the exigencies of post-conviction review.

This Court should grant certiorari and upon full consideration of the issue, this Court should then rule it was a violation of the confrontation clause, and the duty of a prosecutor to restrict his argument to facts in evidence, and grant a new trial at which alleged observations of Kenesha Pryor are testified to only by Kenesha Pryor.

QUESTION 3: WHETHER PETITIONER WAS DENIED DUE PROCESS AND OTHER RIGHTS BY TESTIMONY THAT WHEN FIRST QUESTIONED BY POLICE, HE EXERCISED HIS RIGHT TO REMAIN SILENT.

Petitioner Vincent Ward was convicted of first degree murder and felony firearm. Det. Santiago Serna testified for the prosecution that upon questioning, Petitioner's first response was to request an attorney (T June 18 1996, 247):

> "Q What happened after--what happened while you were reading him his rights?
>
> A We read him his rights. And then when we got to the question if he

> wanted an attorney, he--he indicated that he did--he did want an attorney."

The officer went on to testify that Petitioner later changed his mind and agreed to speak without an attorney. (T June 18 1996, 247-249).

We submit it was clearly improper for the prosecutor to elicit testimony which indicated that the Petitioner had exercised his right to remain silent at the time of his arrest. *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694, 720, 10 A.L.R.3d 974, 1007 (1966); *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *Gravley v Mills*, 87 F3d 779 (CA 6, 1996).

The use of Petitioner's post-arrest silence is unfair because Miranda warnings contain an implied promise rooted in the Constitution, that "silence will carry no penalty." *Doyle v Ohio*, supra; see also *Wainwright v Greenfield*, 474 US 284; 106 S Ct 634; 88 L Ed 2d 623 (1986). This includes the assertion of the right to counsel before answering questions. As the Court held in *Greenfield*:

> "[W]e have continued to reiterate our view that Doyle rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *South Dakota v. Neville*, 459 U.S. 553, 565 (1983).

While the United States Supreme Court in *Jenkins v Anderson*, 477 US 231; 100 S Ct 2124; 65 L Ed 2d 86

(1980), has held that a Defendant can be impeached with his pre-arrest, pre-Miranda warnings silence, *Jenkins* does not control in the case at bar since the utilized silence was post-Miranda warnings and post-arrest.

The attorney-client privilege is fundamental to our system of jurisprudence and the privilege is destroyed if improper inference can be drawn from its exercise. *Doyle v Ohio,* supra.

In *Donnelly v DeChristoforo*, 416 US 637; 94 S Ct 1868; 40 L Ed 2d 431 (1974), the Supreme Court made a careful distinction between improper prosecutor comments generally, and those which violate specific protections under the Bill of Rights, 416 US at 436:

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."

This case plainly falls within the category of cases in which relief should be granted, as outlined in *Donnelly v DeChristoforo*. Here, a specific constitutional right was breached: the constitutional right to insist on an attorney before questioning, and the corollary right, recognized in numerous cases, that this not be used against the defendant at trial.

This was clearly plain error, for the rule that prohibits evidence of the defendant's silence in the face of custodial questioning, his assertion of a privilege, are well-established rules known to all attorneys including prosecutors. See also *Combs v Coyle*, 205 F3d 269 (6th Cir. 2000) holding that

failure of trial counsel to object to testimony that the defendant, upon questioning, asked for a lawyer, "clearly fell below an objective standard of reasonableness."

This Court should grant certiorari, and upon full review of the issue grant a new trial, ruling it was a violation of the privilege against self-incrimination, and the right to counsel, to inform the jury that Petitioner, upon being questioned, requested a lawyer.

QUESTION 4: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Beasley v United States*, 491 F2d 687 (CA 6, 1974); US Const, Amend VI.

1. Counsel failed to object to hearsay testimony, that violated the right of confrontation, that was the only evidence that Petitioner started the fight, and thus was not reacting to provocation. The eyewitnesses said Petitioner was hit several times in the face, kicked in the chest, knocked to the ground, and chased, after hitting the victim's unoccupied van while driving in the parking lot. This supported a claim of voluntary manslaughter on which the judge instructed. The error was prejudicial because if Petitioner had started the fight, he would not be reacting to provocation. See Issue I.

2. Counsel failed to object to the action of the prosecutor in rebuttal closing argument that Petitioner had

made out of court statements to Ms. Pryor that contradicted his statement to police, where Ms. Pryor did not testify and no evidence to support the prosecutor's assertion was introduced. This was prejudicial because it affected the credibility that the jury would place upon Petitioner's statement to police.

3. Counsel failed to object to the introduction of testimony that upon first being questioned by police, Petitioner exercised his right to counsel and to remain silent (he later made a statement). In *Combs v Coyle*, 205 F3d 269 (6th Cir. 2000) the Court held that failure of trial counsel to object to testimony that the defendant, upon questioning, asked for a lawyer, "clearly fell below an objective standard of reasonableness."

4. Petitioner states that trial attorney Cyril Hall never visited him at the Oakland County Jail. He sent replacements to hearings other than preliminary examination and trial. He first met with the Petitioner for only 10 minutes on the day of jury selection, in the bull pen in the basement of the courthouse. He should have consulted with his client, who was held without bond and could not come to the attorney's office. (See affidavit in Appendix). Communication between attorney and client is essential to an attorney-client relationship. Failure to visit and discuss the case with the client is ineffective assistance of counsel. As the Court held in *Mitchell v Mason*, 325 F3d 732 (6th Cir. 2003):

> "Because the Supreme Court has repeatedly made clear that there is a duty incumbent on trial

> counsel to conduct pre-trial investigation, it necessarily follows that trial counsel cannot discharge this duty if he or she fails to consult with his or her client.
>
> ...
>
> The Sixth Amendment guarantees more than a pro forma encounter between the accused and his counsel."

And, as the Court held in *Powell v. Alabama*, 287 U.S. 45, 57 (1932), the pre-trial period is "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important."

The critical failure of an attorney to object can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case, a favorable verdict, or for success on appeal. *Gravley v Mills*, 87 F3d 779 (CA 6, 1996); *Kowalak v United States*, 645 F2d 534, 537-538 (CA 6, 1981); *Corsa v Anderson*, 443 F Supp 176 (ED Mich 1977).

Allowing damaging information to come before the jury without objection, where the evidence could have been excluded, is ineffective assistance of counsel. *Rickman v Bell*, 131 F3d 1150 (CA 6, 1997); *Groseclose v Bell*, 130 F3d 1161 (CA 6, 1997); *Ward v United States*, 995 F2d 1317 (CA 6, 1993). See also *People v Fenner*, 136 Mich App 45 (1984) [failure to object to objectionable testimony]; *People v Roger White*, 142 Mich App 581 (1985) [same]; *People v Ullah*, 216 Mich App 669 (1996) [same]; *People v Stubli*,

163 Mich App 376 (1987) [same].

In *Strickland v Washington*, supra, the Supreme Court held that prejudice is shown from ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 US at 664. Under *Strickland*, the Petitioner need not make the higher showing that "counsel's deficient performance more likely than not altered the outcome of the case." 466 US at 693. However, in this case both the lower standard of *Strickland* and the higher standard rejected by *Strickland* are met.

This Court should grant certiorari, and should then remand this matter to the state courts to conduct an evidentiary hearing. *People v Ginther*, 390 Mich 436 (1973). After or in lieu of that hearing, this Court should then grant a new trial, ruling that Petitioner had ineffective assistance of counsel.

QUESTION 5: WHETHER THE TRIAL COURT USED A STANDARD OF REVIEW THAT UNREASONABLY AND UNCONSTITUTIONALLY ELIMINATED ALL REVIEW OF LEGAL ERRORS.

The circuit judge refused to consider any issue in Petitioner's Motion for Relief from Judgment having determined that prejudice could never be established because of the nature of Petitioner's trial, holding:

> "Defendant argues that he shot the victim in self-defense. If the jury is presented with evidence that Defendant killed the victim, and it was not in

> self-defense, then regardless of any error, Defendant cannot demonstrate there is prejudice." (Op., 4).

This finding is inconsistent, unreasonable and contrary to established law. The trial court created an artificial standard, not authorized by statute or federal and state case law in foreclosing review of any issues relating to a murder trial where self-defense was asserted because "the jury is presented with evidence that Defendant killed the victim." If the jury had not been presented with any evidence that a defendant killed a victim there would have been no trial in the first place from which any review would be sought. Whether this is a proper standard is a question of major significance to the jurisprudence of this state.

The specific effect of this standard is that any defendant convicted of murder and who raised self-defense at his trial, is forever foreclosed from being afforded relief from the presentation of evidence and argument that violates constitutional standards. A blanket rule that all errors are harmless wherever there is evidence the defendant committed the crime is unreasonable. The ruling violated fundamental due process rights and denied Petitioner equal protection of the laws.

If a state court arbitrarily withholds the benefit of a state rule of law from a Defendant, due process of law is denied. If a state court system treats similarly situated defendants differently, equal protection of law is denied. US Const, Amend XIV; Const 1963, Art 1, §§ 2, 17; *Hicks v Oklahoma*, 447 US 343; 100 S Ct 2227; 65 L Ed 2d 175

(1980); *Jones v Russell*, 299 F Supp 970 (ED Tenn, 1968); *Braley v Gladden*, 403 F2d 858 (CA 9, 1968); *Baldwin v Blackburn*, 653 F2d 942 (CA 5, 1981).

We submit that the application of harmless error rules is a question of national importance suitable for United States Supreme Court review, and that this case involves injustice to Mr. Ward, making it more suitable for review.

This Court should grant certiorari and upon full consideration of the issues, reverse the rulings and holdings of the circuit court and grant a new trial, or remand to the state courts for consideration under a proper standard that looks at actual prejudice, rather than an artificial standard that no error can be prejudicial in a self-defense case.

QUESTION 6: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); US Const, Amend VI. This includes a right to the effective assistance of counsel on appeal. *Evitts v Lucey*, 469 US 387; 105 S Ct 830; 83 L Ed 2d 821 (1985); *Penson v Ohio*, 488 US 75; 109 S Ct 346; 102 L Ed 2d 300 (1988); US Const, Amend VI; US Const, Amend XIV.

In *Beasley v United States*, 491 F2d 687 (CA 6, 1974), the Court stated that, to be constitutionally adequate, "Defense counsel must investigate all apparently substantial defenses available to the Defendant and must assert them in a

timely manner."

The critical failure of an attorney to object or raise an issue can be ineffective assistance of counsel if it deprives the Petitioner of an opportunity for dismissal of the case or for success on appeal. *Gravley v Mills*, 87 F3d 779 (CA 6, 1996); *Kowalak v United States*, 645 F2d 534, 537-538 (CA 6, 1981); *Corsa v Anderson*, 443 F Supp 176 (ED Mich 1977).

Petitioner's affidavit (see Appendix) shows that he informed appeal attorney Lawrence Imerman about trial counsel Cyril Hall's refusal to meet with him until 10 minutes before trial. Attorney Imerman took no action.

Petitioner Ward had numerous substantial defenses to raise on appeal (found within this Motion for Relief from Judgment and Brief in Support), and appeal counsel did not raise them. We submit there was ineffective assistance of appellate counsel regarding the failure of the appeal attorney to raise the issues raised here. It is reasonably probable that Petitioner Ward would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel. See *Mapes v Coyle*, 171 F3d 408 (CA 6, 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious." More recently, the Sixth Circuit in *McFarland v Yukins*, 356 F3d 688 (CA 6, 2004) found ineffective assistance of appellate counsel from the failure of appellate counsel to raise the issue of ineffective assistance of trial counsel:

> "Because we have already held that the ineffectiveness claim was meritorious and should

> have resulted in a reversal of McFarland's conviction, there is no question but that appellate counsel's errors were prejudicial. Consequently, McFarland has shown cause and prejudice excusing her failure to raise ineffective assistance of trial counsel on her direct appeal. Nothing, therefore, bars her from litigating this claim."

Under *Mapes v Coyle* and many other cases, a court may find ineffective assistance of appellate counsel from the failure to raise particular issues on appeal if the issues were obvious or should have been discovered, and if the failure to raise them was prejudicial. It is impossible to imagine how failure to raise these issues could have helped Mr. Ward's appeal in any way.

Numerous federal cases hold that failure to raise particular issues on appeal can be found to be ineffective assistance of appellate counsel, even if other plausible issues are raised on appeal. *Mapes v Coyle*, supra; *Jackson v Leonardo*, 162 F3d 81 (CA 2, 1998); *Mason v Hanks*, 97 F3d 887 (CA 7, 1996); *Banks v Reynolds*, 54 F3d 1508 (CA 10, 1995); *Mayo v Henderson*, 13 F3d 528 (CA 2, 1994); *Fagan v Washington*, 942 F2d 1155, 1157 (CA 7,1991); *Matire v Wainwright*, 811 F2d 1430, 1438 (CA 11,1987); *Bell v Jarvis*, 236 F3d 149 (CA 4, 2000).

Ineffective assistance of appellate counsel is "good cause" for failing to raise an issue in the appeal of right. *Edwards v Carpenter*, 529 US 446; 120 S Ct 1587; 146 L Ed 2d 518 (2000); *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986); MCR 6.508(D); *People v Carpentier*, 446 Mich 19 (1994).

In fact, the issues of hearsay denying right of confrontation, that was the only evidence Petitioner started the fight, the prosecutor making up evidence, admitting evidence that the Petitioner at first chose to ask for an attorney and remain silent, and the issues of ineffective assistance of trial counsel, were "dead-bang winners" for Petitioner, and the issues were "obvious from the trial record," meaning that there was ineffective assistance of counsel from failure to raise them. *Banks v Reynolds*, supra; *United States v Cook*, 45 F3d 388 (CA 10, 1995); *Jackson v Leonardo*, supra.

CONCLUSION

Petitioner Vincent Ward respectfully submits that for the reasons stated above, this Court should grant Certiorari, reverse the judgment of the state courts, and grant a new trial.

Respectfully submitted,

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Ward
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930

Dated: July 19, 2007

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 1995-141741-FC
Hon. Gene Schnelz

VINCENT WARD,
Defendant.

DAVID G. GORCYCA (P41352)
Oakland County Prosecuting Attorney
1200 N. Telegraph Rd.
Pontiac, MI 48341

JAMES STERLING LAWRENCE (P33664)
Attorney for Defendant
717 Penobscot Building
Detroit, MI 48226

I

OPINION AND ORDER

At a session of said Court, held in the Courthouse, in the City of Pontiac, County of Oakland, State of Michigan, on MARCH 15, 2005

PRESENT: HONORABLE GENE SCHNELZ,
Circuit Judge

This matter is before the Court on Defendant's Motion for Relief from Judgment pursuant to MCR 6.500 *et seq.* On June 20, 1996, Defendant was convicted by a jury of first-degree murder, contrary to MCL 750.316, and possession of a firearm during the commission of a felony,

contrary to MCL 750.227b. Defendant was sentenced to consecutive terms of life imprisonment without parole for the murder conviction and two years' imprisonment on the felony-firearm conviction. Defendant's convictions were affirmed on appeal. *People v Vincent Ward,* unpublished opinion per curiam of the Court of Appeals, decided May 1, 1998 (Docket No. 200739), Iv den 459 Mich 940 (1999).

When challenging a conviction by a motion for relief from judgment, Defendant has the burden of establishing that he is entitled to relief. MCR 6.508(D). MCR 6.508(D)(3) provides that "[t]he court may not grant relief to the defendant if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter unless the defendant demonstrates ... good cause for failure to raise . . . [the issue] on appeal or in the prior motion, and . . . actual prejudice from the alleged irregularity . .. ." MCR 6.508(D)(3)(a) and (b).

Good cause is established by proving ineffective assistance of appellate counsel or by showing some external factor prevented counsel from previously raising the issue. *People* v *Reed,* 449 Mich 375, 378 (1995). The court may waive good cause if it concludes there is a significant possibility the defendant is innocent of the crime. MCR 6.508(D)(3).

Actual prejudice means that:

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty ... the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) In any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid. MCR 6.508(D)(3).

"Postconviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice." *Reed, supra,* at 381. In his motion. Defendant presents the following grounds for relief arguing: (1) he was denied the right of confrontation by testimony of people who did not see Defendant attack the victim first; (2) the prosecution denied Defendant due process and the right of confrontation by making remarks in closing regarding Defendant's statements to Ms. Pryor; (3) he was denied due process by testimony he asserted his right to counsel; (4) he was prejudiced by ineffective assistance of counsel; (5) he was prejudiced by ineffective assistance of counsel on appeal; (6) his legal issues may properly be heard.

As a threshold matter. Defendant argues that the prosecution's closing remarks, regarding Defendant's statements to Ms. Pryor, resulted in a jurisdictional defect. To bypass the limitations of MCR 6.508, the defendant must demonstrate there was improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, imprisonment when the trial court had no authority to sentence defendant to the institute in question, or that the defendant was convicted for no crime whatsoever. *People v Carpentier,* 446 Mich 19, 49-50 (1994) (Riley J., concurring). "If the court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however, erroneous, irregular or unsupported

by evidence is no jurisdictional defect." *Id.* at 46-47.

This Court finds there is no jurisdictional defect and that Defendant is subject to the requirements of MCR 6.508.

Turning first to the prejudice prong, Defendant must demonstrate that but for the alleged errors, he would have a reasonable likelihood of acquittal. Defendant argues that he shot the victim in self-defense. If the jury is presented with evidence that Defendantkilled the victim, and it was not in self-defense, then regardless of any error. Defendant cannot demonstrate there is prejudice.

In this case, Michael Dixon testified Defendant's vehicle struck the victim's vanin the parking lot of the strip mall. Mr. Dixon observed the victim come out of his storeand inspect the vehicle. Mr. Dixon later saw the victim and Defendant exchanging words. He also saw the victim punch and kick Defendant. Then Mr. Dixon saw Defendant walk back to the Lion's Market yelling and screaming and making a lot of noise.

Nathaniel Roberts testified that he witnessed the "conflict" and saw the victim sock Defendant in the face. When Mr. Roberts came out of the Lion's Market he observed Defendant with a clip for a gun telling "everybody to leave the store, he about(sic) to do them in."

Otok Breaux testified she worked for the victim at his beauty supply store. Ms.Breaux testified she was outside in the parking lot talking with her father-in-law when Defendant walked into the beauty supply store carrying a long gun. She then heard thegun shooting. She ran and hid and then saw Defendant leave the store. When she raninside the store she saw the victim lying on the ground.

Sara Choi, the victim's wife, testified she was inside the store talking with her husband while she cleaned the store when she heard a gun sound. Then she heard Defendant say "mother fucker, I told you I'd be back and kill you." She looked and saw the Defendant a few feet away. She then saw him walk out of the store. When she looked for her husband, she saw his feet, and then she saw blood.

Dr. Kanu Virani, Deputy Chief Medical Examiner, testified the victim died ofgunshot wounds to the head and back.

Based upon this testimony, the jury found Defendant guilty of first-degree murder and possession of a firearm during the commission of a felony. None of the errors raised by Defendant undermine this evidence and create a reasonable likelihood of acquittal. MCR 6.508(D)(3)(b)(i). Therefore, Defendant has failed to demonstrate actual prejudice.

In order to obtain postappeal relief under MCR subchapter 6.500, it is Defendant's burden to demonstrate both "good cause" and "actual prejudice." MCR 6.508(D)(3)(a) and (b). Because Defendant has failed to demonstrate "actual prejudice"it is unnecessary to address the "good cause" component. MCR 6.508(D); see also *People v Pennington,* 240 Mich App 188, 198 (2000); *People v Reed,* 449 Mich 375, 400-401 (1995).

WHEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is denied.

GENE SCHNELZ
CIRCUIT JUDGE
HON. GENE SCHNELZ

Court of Appeals, State of Michigan
ORDER

People of MI v Vincent Ward
Docket No. 268923
LCNo. 1995-141741-FC

Michael J. Talbot
Presiding Judge
E. Thomas Fitzgerald
Michael R. Smolenski
Judges

The Court orders that the motion to remand is DENIED.

The delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

/S/ Michael J. Talbot
Presiding Judge

SEAL

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 28 2006
Date

/S/ Sandra Schultz Mengel
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

April 24, 2007

Clifford W. Taylor,
Chief Justice

132534

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v SC: 132534
COA: 268923
VINCENT WARD, Oakland CC: 1995-141741-FC
Defendant-Appellant.
/

On order of the Court, the application for leave to appeal the September 28, 2006 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 24, 2007
Date

/S/ Corbin A. Davis
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

VINCENT WARD,
Defendant-Appellant

UNPUBLISHED
May 1,1998
No.200739
Oakland Circuit Court
LCNo.95-141741-FC

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.
PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to consecutive terms of life imprisonment without parole for die murder conviction and two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress his confession because it was not voluntarily given. We disagree. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Robinson,* 386 Mich 551,557; 194 NW2d 709 (1972). However, we gi[illegible] deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *People v Brannon,* 194 Mich App 121,131; 486 NW2d 83 (1992).

Defendant argues that the police officers threatened him both physically and psychologically into giving a

confession. He testified that be felt physically threatened by the officer who drove him to The police station and then stood outside the door of the interrogation room. However, he admitted that he initially exercised his right to have an attorney despite being physically intimidated. Furthermore, defendant was the one who began asking questions after requesting an attorney. Finally, the trial court apparently did not find defendant's version of events credible. The officers denied using any threats. As stated, this Court defers to the trial court's superior ability to view the evidence and witnesses. The trial court did not clearly err in finding that defendant's statement was voluntary.

Defendant next argues that prosecutorial misconduct denied him a fair trial. Prosecutorial misconduct issues are reviewed on a case by case basis. *People v McElhaney,* 215 Mich App 269, 283; 545 NW3d 18 (1996). On review, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context *Id.*

Defendant first takes issue with the prosecutor's comment during closing argument mat "[tjhis is the best case of first-degree murder that I've ever seen." Prosecutorial remarks which inject personal opinions into the case are generally improper. *People v Bahoda,* 448 Mich 261, 286-287; 531 NW2d 659 (1995). However, injecting personal opinions does not always amount to error requiring reversal. *Id.* This Court must determine whether the error caused the jury to suspend its power of judgment in favor of the belief of the prosecutor's office. *Id.* at 287. After review of the record, we conclude mat me prosecutor's comment, even if improper, did not constitute error requiring reversal.

Defendant also argues that the prosecutor deprived him of a fair trial when he misstated that the law required the court to give an instruction on manslaughter. However, an alleged misstatement of the law by the prosecutor is presumptively not harmful, since the trial judge instructed the jury properly. *People v Reed,* 449 Mich 375,401; 535 NW2d

496 (1995). Defendant was not denied a fair trial by the prosecutor's misstatement.

Finally, defendant argues that the trial court erred in allowing two witnesses to view a photographic showup while defendant was in custody. We disagree. Because defendant failed to challenge the pretrial identification procedures below, appellate review is foreclosed absent manifest injustice. *People v Melvin Davis,* 146 Mich App 537, 547; 381 NW2d 759 (1985). The record indicates that, prior to the preliminary examination, a corporeal lineup was scheduled. However, due to defendant's light skin color and small stature, the police were unable to secure individuals with similar characteristics for a proper lineup. This is a recognized exception to the general requirement that a photographic lineup should not be used when the accused is in custody. See *Id.* at 546. Accordingly, no manifest injustice would result from our failure to further review this issue.

Affirmed.

/s/ Robert P. Young, Jr.
/s/Michael J.Kelly
/s/ Martin M. Doctoroff

Order

Michigan Supreme Court
Lansing, Michigan

January 26, 1999

Elizabeth A. Weaver,
Chief Justice

132534

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v SC: 112346
COA: 200739
VINCENT WARD, LC: 95-141741-FC
Defendant-Appellant.
_____/

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Young, Jr., J., not participating.

SEAL

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 26, 1999

/S/ Corbin A. Davis
Clerk